Supreme Court, U.S.
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No. 01-1589

In The
Supreme Court of the United States

ANTONIO HERNANDEZ-LOPEZ,
JOE EDWARD RAMIREZ, and ALBERTO RUIZ,

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari
To The Iowa Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. ARE THE PETITIONERS' CLAIMS MOOT BECAUSE THEY WERE RELEASED FROM THE SIOUX COUNTY JAIL ON JANUARY 8, 2001 AND DEPORTED TO MEXICO?

II. HAVE PETITIONERS FAILED TO PRESERVE ERROR REGARDING THE CONSTITUTIONALITY OF WARRANTLESS ARRESTS BECAUSE THIS ISSUE WAS NOT RAISED IN DISTRICT COURT OR THE IOWA SUPREME COURT?

III. DID THE IOWA SUPREME COURT DECISION TURN SOLELY UPON THE PARTICULAR FACTS OF THE CASE?

IV. DID THE IOWA SUPREME COURT PROPERLY FIND THAT, EXCEPT IN EXIGENT CIRCUMSTANCES, AN OFFICER SHOULD FIRST OBTAIN AN ARREST WARRANT FROM A MAGISTRATE BEFORE ARRESTING AN INDIVIDUAL AS A MATERIAL WITNESS?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Summary of the Argument	3
Reasons for Denying the Writ	4
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1998) 8, 17

Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) 11

Application of Cochran, 434 F. Supp. 1207 (D. Nebraska 1977) 11, 13, 14, 15, 17

Banker's Life and Cas. Co. v. Crenshaw, 108 S.Ct. 1645, 486 U.S. 71, 100 L.Ed.2d 62 (1988) 10

FW/PBS, Inc. v. Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) 5

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 10, 11

Lewis v. Continental Bank Corp., 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) 5

Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) 6

Monks v. New Jersey, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) 10, 13

North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) 4, 5

Spencer v. Kemna, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) 4, 5, 6, 7

St. Pierre v. United States, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943) 5

TABLE OF AUTHORITIES – Continued

Page

State v. Misik, 238 N.J. Super. 367, 569 A.2d 894 (1989) 13, 14, 15, 17

State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2001) ..... *passim*

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) 11

STATE STATUTES

Iowa Code § 804.11 ..... 7, 8, 9

Iowa Code § 804.23 ..... 1, 7

Iowa Code § 811.2(7)(b) 2, 7

CONSTITUTIONAL AMENDMENTS

U.S. Const., amend. IV 1, 3, 10, 11

U.S. Const., art. III, § 2 4

OPINIONS BELOW

The State accepts the Petitioners' statement regarding the opinions below.

JURISDICTION

The State accepts the Petitioners' statement regarding the Court's jurisdiction over this matter.

STATUTES INVOLVED

The State accepts the Petitioner's statement regarding the statute at issue in this case, with the addition that Respondent references

The Fourth Amendment of the United States Constitution, which provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Iowa Code § 804.23. Initial appearance of arrested material witness before magistrate.

The officer shall, without unnecessary delay, take the person arrested pursuant to section 804.11 before the nearest or most accessible magistrate to the place where the arrest occurred.

At the appearance before the magistrate, the law enforcement officer shall make a showing to the magistrate, by sworn affidavit, that probable cause exists to

believe that a person is a necessary and material witness to a felony and that such person might be unavailable for service of a subpoena. The magistrate may order the person released pursuant to section 811.2.

Iowa Code § 811.2(7)(b). Appeal from conditions of release.

In any case in which a court denied a motion under paragraph "a" of this subsection to amend an order imposing conditions of release, or a defendant is detained after conditions of release have been imposed or amended upon such a motion, an appeal may be taken from the district court. The appeal shall be determined summarily, without briefs, on the record made. . . .

STATEMENT OF THE CASE

Respondent accept the petitioners' Statement of the Case with the following corrections. Respondent disagrees with petitioners' claim that "[t]hough never charged with any crime, Petitioners were arrested without a warrant and incarcerated for five months in the Sioux County Jail as material witnesses." Pet. Brief at 2. Petitioners were arrested on August 5, 2000 because they were in a car that crossed the centerline, struck a motorcyclist head-on, and killed the driver of the motorcycle. Pet. App. at 2. They were arrested because they fled the scene after the crime and investigating officers were unable to discern who was driving the automobile at the time of the vehicular homicide. Pet. App. at 2. Petitioners' Statement of the Case is therefore incorrect to the extent it implies the petitioners were initially "arrested" as material witnesses. Officers were not able to determine who was the driver of the

automobile until laboratory tests were completed on September 11, 2000. Pet. App. at 3-4.

Respondents also supplement the Statement of the Case with the following facts from the Iowa Supreme Court decision: Because the defendants were no longer in state custody, the State filed a motion to dismiss this appeal as moot. Pursuant to the Immigration and Naturalization Service detainer, the defendants were transferred to INS custody upon their release from the county jail. The defendants have since been deported from this country. Pet. App. at 5.

SUMMARY OF THE ARGUMENT

Petitioners have not met their burden of showing that this Court has jurisdiction to review their claims because they do not have a personal stake in the outcome of this lawsuit. Petitioners were released from the Sioux County Jail on January 8, 2001 and immediately turned over to the custody of INS. Pet. App. at 5. They were deported after they were turned over to INS. Pet. App. at 5. They also have not shown that this is an "exceptional" case that is "capable of repetition, yet evading review" because they have not shown the challenged action is too short to be fully litigated prior to cessation and that there is a reasonable expectation that they will be subject to the same action again. Petitioners also failed to preserve error because their claim that they were arrested as material witnesses without prior judicial approval was not raised or presented to the district court or the Iowa Supreme Court. This claim is actually a Fourth Amendment claim that the Iowa Supreme Court declined to address due to the

petitioners' failure to preserve error in district court. The petitioners' claim that their continued incarceration after their depositions were taken violates due process was also not preserved because it was not raised in district court and the Iowa Supreme Court specifically declined to address this issue. Petitioners also have not presented an important federal question for this Court to review because each state has a distinct material witness statute and the due process claims in each of the cases cited by petitioners vary based on the wording of each statute, the standing of the parties, and the factual circumstance of each case. Finally, the Iowa Supreme Court decision is favorable to the position the petitioners assert in this appeal and need not be disturbed.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS' CLAIMS ARE MOOT BECAUSE THEY WERE RELEASED FROM THE SIOUX COUNTY JAIL ON JANUARY 8, 2001 AND DEPORTED TO MEXICO.

The petitioners' claims are moot because they fail to present this Court with a case or controversy under Article III, section 2, of the Constitution. *Spencer v. Kemna,* 523 U.S. 1, 7, 118 S.Ct. 978, 983, 140 L.Ed.2d 43, 49 (1998). Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions. *Id.* at 246, 92 S.Ct. at 404, 30 L.Ed.2d at 416. "To be cognizable in a federal court, a suit must be definite and concrete,

touching the legal relations of parties having adverse legal interests." *Id.* "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*

It is the burden of the party who seeks the exercise of jurisdiction in his favor to "clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603, 622 (1990). Petitioners fail to meet this burden. Throughout all stages of the judicial proceedings, the parties must continue to have a "personal stake in the outcome of the lawsuit." *Spencer v. Kemna,* 523 U.S. at 7, 118 S.Ct. at 983, 140 L.Ed.2d 43, 49 (1998), *quoting Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477-478, 110 S.Ct. 1249, 1254, 108 L.Ed.2d 400 (1990). "This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* Petitioners were released from the Sioux County Jail on January 8, 2001 after the Sioux County Attorney's Office dismissed charges against them. Pet. App. at 5. They were immediately turned over to INS for deportation proceedings. Pet. App. at 5. Petitioners have not shown that under either state or federal law further penalties or disabilities can be imposed on them as a result of the material witness statute. *St. Pierre v. United States,* 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943) (refusing to allow petitioner to challenge contempt citation after completing 5-month sentence). The petitioners' claims are moot and this Court is without power to act – there is nothing for it to remedy

even if it is disposed to do so. *Kemna,* 523 U.S. at 18, 118 S.Ct. at 988, 140 L.Ed.2d at 56.

Petitioners claim that this Court should review their claims despite the fact that their cases have been dismissed because "the Iowa Supreme Court chose to address the constitutional validity of Iowa's material witness statute despite its conclusion that the issues raised were technically moot." Pet Brief at 10. The Iowa Supreme Court, however, did not address the claims petitioners raise here. The Iowa Court specifically found that petitioners' "as applied" Due Process challenge to the statute was moot because petitioners had been released from custody and were no longer within the jurisdiction of the state. *State v. Hernandez-Lopez,* 639 N.W.2d 226 (Iowa 2001). The Iowa Court declined to address the petitioners' claims that "section 804.11, *as applied to their specific factual situation,* violated their rights to substantive and procedural due process." *Id.* (emphasis added). Therefore the claims the petitioners make in this petition for writ of certiorari were specifically dismissed as moot by the Iowa Supreme Court.

The Petitioners also claim that this Court should review the Iowa Court decision because "this Court has, on many occasions, accepted review of a case if it is capable of repetition, yet evading review." Pet. Brief at 12. The capable-of-repetition doctrine, however, applies only in "exceptional situations." *Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983). Two circumstances must be simultaneously present in order for the doctrine to apply: 1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and 2) there is a reasonable expectation that the same complaining party will be subject to the same

action again. *Kemna,* 523 U.S. at 18, 118 S.Ct. at 988, 140 L.Ed.2d at 56. Neither of these circumstances are present here.

Petitioners have not shown that the challenged action is too short in duration to be fully litigated. In fact, their application for discretionary review was granted by the Iowa Supreme Court prior to the expiration of the district court proceedings. The Iowa Supreme Court ordered that district court proceedings be stayed and that the bond of the petitioners be lowered. Resp. App. 1. Alternatively, petitioners could have used Iowa Code section 811.2(7)(b) to summarily appeal the district court order requiring the posting of a $32,500 bond to an appellate court. This section allows material witnesses to challenge the conditions of release prior to the expiration of the underlying criminal action. Iowa Code §§ 804.11; 804.23 (2001).

In addition, the petitioners are citizens of Mexico who, at the time of this action, were in the United States illegally. Pet. App. at 5. INS placed a detainer on them on August 8, 2000 and they were turned over to INS for deportation proceedings after their release from the Sioux County Jail on January 8, 2001. Pet. App. at 5. There is not a reasonable expectation that the petitioners will be subject to the same action again. Petitioners have not established that the "capable of repetition doctrine" applies to this case. *Kemna,* 523 U.S. at 17-18, 118 S.Ct. at 988, 140 L.Ed.2d at 56.

II. PETITIONERS FAILED TO PRESERVE ERROR REGARDING THE CONSTITUTIONALITY OF WARRANTLESS ARRESTS BECAUSE THIS ISSUE WAS NOT RAISED IN DISTRICT COURT OR THE IOWA SUPREME COURT.

A. The Iowa Supreme Court Did Not Address Petitioners' "As Applied" Due Process Challenge.

The Iowa Supreme Court declined to address the petitioners' claims that Iowa Code section 804.11, as applied to their specific factual situation, violated their rights to substantive and procedural due process. *Id.* The Iowa Supreme Court stated that this issue was moot because the petitioners had been released from custody and they were no longer within the jurisdiction of the state. *State v. Hernandez-Lopez,* 639 N.W.2d 226, 235 (Iowa 2001). Petitioners' claim that section 804.11 is unconstitutional as applied to them has therefore not been preserved. The United States Supreme Court adheres to the rule that it will not consider petitioners' claim unless it was either addressed by, or properly presented to, the state court that rendered the decision it has been asked to review. *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1998).

The petitioners note that the Iowa Supreme Court chose to address the facial challenge to the validity of Iowa's material witness statute "despite its conclusion that the issues raised were technically moot." Pet. Brief at 10. It is true that the Iowa Supreme Court found that petitioners' facial due process challenge to section 804.11 was not moot because it was an issue of public importance, because appellate courts had not yet interpreted the statute, and because "a decision would provide guidance to

law enforcement personnel and judicial officers faced with similar situations in the future." *Id.* The fact that the Iowa Court addressed petitioners' "facial" challenge to the statute, however, does not save their "as applied" challenge to the statute that they attempt to pursue in this petition.

B. Petitioners Have Impermissibly Amplified Their Due Process Challenge.

In the district court, the petitioners' "facial" challenge to the constitutionality of the statute centered on the argument that their continued detention in the Sioux County Jail was "punishment." Their motion in the district court stated that section 804.11 was "unconstitutional on its face and as applied to the Defendants in that it is punishing the Defendants without benefit of a trial and is therefore a violation of the Defendant's due process under the U.S. and Iowa Constitutions. . . . " Pet. App. at 30. On appeal, the Iowa Supreme Court addressed this claim and found that the statute was not unconstitutional because the power to detain a material witness was "utilized to secure a witness' attendance at trial, not to punish the witness." *Henandez-Lopez,* 639 N.W.2d at 239.

Petitioners have now re-drafted their argument in this petition for writ of certiorari. They no longer emphasize that their detention was a violation of due process because it was punishment without trial. They now allege that their initial arrest was a violation of due process because officers did not have prior judicial approval. Pet. Brief at 13, 16. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and await review in this Court to specify the constitutional

provision it is relying upon." *Banker's Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, 77, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62, 71 (1988). "At the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* The issue of whether these petitioners were "arrested" as "material witnesses" without prior judicial approval was not raised or presented to the district court or the Iowa Supreme Court and this Court should refuse to allow petitioners to raise it for the first time in a petition for writ of certiorari. *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) (Court may not address Constitutional questions raised for the first time in writ when state courts have had no opportunity to pass on it).

C. Petitioners' Claim Is Actually An Unpreserved Fourth Amendment Challenge.

Petitioners' claim is also not preserved because it is not really a Due Process argument. The petitioners claim that the statute unconstitutionally "authorizes the arrest of a person by a law enforcement officer 'with or without an arrest warrant.'" Pet. Brief at 13. This is actually a claim under the Fourth Amendment rather than the Due Process Clause. The Fourth Amendment provides an "explicit textual source of constitutional protection" against physically intrusive governmental conduct and it is the Fourth Amendment, not the "more generalized notion of 'substantive due process'" that is the guide for analyzing these claims. *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443, 454 (1989).

The Iowa Supreme Court specifically declined to address the petitioners' Fourth Amendment claims because "[t]hey did not frame any challenge before the district court in the context of the Fourth Amendment." *Hernandez-Lopez,* 639 N.W.2d at 234.

Petitioners attempt to evade this failure to preserve error by noting that in *Application of Cochran* the Court stated that "there can be little difference between the question of whether the arrest and detention are reasonable under the Fourth Amendment and whether they comport with the due process clause of the Fourteenth Amendment." *Cochran,* 434 F. Supp. 1207, 1212, n. 12 (D. Nebraska 1977). *Cochran* is inapposite. It was decided in 1977 and since that time the United States Supreme Court has made clear that a claim arising in the context of an arrest or investigatory stop of a person is properly characterized as one invoking the protections of the Fourth Amendment "reasonableness" standard rather than the Due Process Clause. *Connor,* 490 U.S. at 395, 109 S.Ct. at 1871, 104 L.Ed.2d 454 (claims that officers used excessive force in the course of an arrest, investigatory stop, or other seizure of a citizen should be analyzed under the Fourth Amendment); *Tennessee v. Garner,* 471 U.S. 1, 5, 105 S.Ct. 1694, 1698, 85 L.Ed.2d 1, 6 (1985) (use of deadly force to apprehend fleeing suspect reviewed solely by reference to Fourth Amendment rather than Due Process Clause); *Albright v. Oliver,* 510 U.S. 266, 268, 114 S.Ct. 807, 810, 127 L.Ed.2d 114 (1994) (refusing to recognize a substantive right under the Due Process Clause to be free from criminal prosecution except upon probable cause).

D. The Iowa Supreme Court Declined to Address Petitioners' Claim That Their Continued Incarceration After Their Depositions Were Taken Violated Due Process Because They Failed to Preserve Error.

The petitioners' claim that their continued incarceration after their depositions were taken violates due process was not raised in the district court or the Iowa Supreme Court. During the bond review hearing petitioners' counsel made the following argument with regard to the use of depositions:

> I would just like to tell the court, as has already been stated, these gentlemen's depositions have been taken, their testimony has been given. If they are unavailable for trial, I believe their testimony can be used for either party, and I believe that to hold them further without a definite trial date is violating their constitutional and statutory rights. I have nothing further.

Resp. App. 4.

The Iowa Supreme Court found that petitioners' "mere assertion" that a statute is unconstitutional did not encompass every conceivable constitutional violation and found that this issue was not preserved. *Hernandez-Lopez,* 639 N.W.2d at 233-234. Petitioners admit that the Iowa Supreme Court "refused to address petitioners' claims that the continued incarceration after deposition violated their due process rights." Pet. Brief at 19. They nevertheless contend that this ruling lets "stand the lower court's ruling that a five month incarceration was not unconstitutional because release would have violated the criminal defendant's confrontation clause rights." Pet. Brief at 19. This is

not an accurate representation. The district court never ruled on the constitutionality of the petitioners' continued incarceration after their depositions were taken because the petitioners' never raised this issue before the district court. Their failure to raise this issue below is fatal to their attempt to raise it for the first time in this petition for writ of certiorari. *Monks*, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) (Court may not address Constitutional questions raised for the first time in writ when state courts have had no opportunity to pass on it).

III. THE IOWA SUPREME COURT DECISION TURNS SOLELY UPON THE PARTICULAR FACTS OF THE CASE.

It is clear that each of the petitioners in this case fled from the scene of a vehicular homicide and were initially apprehended because officers were not certain who was driving the car. Pet. App. at 2. The existence of exigent circumstances distinguishes this case from those cited by the petitioners. *Misik, Cochran* and *Hernandez-Lopez* all state that prior judicial approval to arrest is not necessary when exigent circumstances exist. *State v. Misik,* 238 N.J. Super. 367, 388, 569 A.2d 894 (1989) (a fleeing material witness still may be apprehended if the circumstances justify an arrest for obstruction of justice); *Cochran,* 434 F. Supp. at 1214 ("emergency procedures can be devised to serve the legitimate state interest where flight of the witness is imminent."); *Hernandez-Lopez,* 639 N.W.2d at 242 (we recognize exigent circumstances may exist in certain cases, such as where an officer is in hot pursuit of a witness and the warrant requirement would unreasonably frustrate the officer's efforts to locate the witness). Further, this Court would have difficulty deciding the

issue because, as mentioned, petitioners framed their due process argument to the district court as a constitutional deprivation due to prolonged post-arrest detention rather than a constitutional deprivation due to a warrantless arrest as they argue here. Pet. App. at 30. The record with regard to this issue was therefore not developed in this case.

In addition, the petitioners were in this country illegally and would in any event have been "detained" by INS after their release. This additional fact distinguishes this case from those relied on in the certiorari petition. The Iowa Supreme Court stated that this factor could be considered by a magistrate in determining the likelihood a witness would be "available" for trial. *Hernandez-Lopez,* 639 N.W.2d at 240 n. 6. Cases cited by petitioners are distinguishable because they do not include this complicating factor with regard to the material witnesses' unavailability.

The petitioners attempt to create an important federal question by arguing that state and federal decisions regarding the constitutionality of material witness statutes are in "conflict." Pet. Brief at 13. They claim that the Court in *Cochran* found that material witnesses were being detained in violation of due process. Pet. Brief at 14 *citing Cochran,* 434 F. Supp. at 1212. The petitioners also claim that in *Misik,* the Court concluded that due process requires that a person must be served with an order directing a person to appear before that person is apprehended or detained as a material witness. Pet. Brief at 15 *citing Misik,* 569 A.2d at 903. Petitioners claim that these questions present a federal issue because these Courts "have addressed the same due process claims that the Iowa Supreme Court has decided. . . . " Pet. Brief at 16.

However, the fact that these Courts have generally addressed "due process" claims does indicate that they have each decided the *same* due process claim.

As petitioner mentions, every state has its own material witness statute. Pet. Brief at 9. The statutes are not uniform and the "due process" analysis by each Court necessarily hinges on the unique language used in the different statutes. The material witness statutes at issue in this case, *Cochran,* and *Misik,* vary considerably. *Hernandez-Lopez,* 639 N.W.2d at 236; *Cochran,* 434 F. Supp. at 1209; *Misik,* 569 A.2d at 898, n. 2. Further, as mentioned, the Iowa Supreme Court ruled that petitioners' applied due process challenge was moot in *Hernandez-Lopez* and did not address that issue. *Hernandez-Lopez,* 639 N.W.2d at 235. The witnesses in *Cochran* and *Misik* were still being detained when the Courts addressed their "as applied" due process challenges. *Cochran,* 434 F. Supp. at 1216-1217; *Misik,* 569 A.2d at 905.

Further there are several factual distinctions between the material witness cases cited by the petitioners that make a comparison between the cases difficult. In *Misik,* for example, the Court noted that the witness was arrested as a material witness even though there was no pending criminal action, that the witness was interrogated for several hours after his arrest rather than immediately being brought before a magistrate, and that the prosecutor made no showing that the witness was "unavailable" as required by the statute. *Misik,* 569 A.2d at 376-377. In *Cochran,* the Court's analysis focused on post-detention procedures required when a state seizes a person and "commits him to complete custodial detention for an extended period of time." *Cochran,* 434 F. Supp. at 1212. Although *Misik* and *Cochran* deal broadly with the concept

of "due process," their factual distinctions make the holdings by the Courts difficult to compare.

In sum, while the petitioners claim that this case presents a federal issue concerning "due process," the cases they cite to support a "conflict" are diverse in terms of the statutes applied, the standing of the parties, and the circumstances of each case. The Iowa Supreme Court decision rests on an analysis of the unique facts of the case and does not present an important federal question for this Court to review.

IV. THE IOWA SUPREME COURT PROPERLY FOUND THAT, EXCEPT IN EXIGENT CIRCUMSTANCES, AN OFFICER SHOULD FIRST OBTAIN AN ARREST WARRANT FROM A MAGISTRATE BEFORE ARRESTING AN INDIVIDUAL AS A MATERIAL WITNESS.

This Court should also deny petitioners' petition for writ of certiorari because the one constitutional issue that was even arguably preserved – the facial challenge to the statute – was decided in petitioners' favor. Petitioners contend that the Iowa Supreme Court "held in this case that the warrantless arrest of Petitioners satisfied due process." They then contend that this holding is "directly contrary to decisions from Nebraska, New Jersey, and Ohio." Pet. Brief at 13. Neither of these contentions is accurate. As mentioned, the Iowa Supreme Court did not decide whether the arrest of *these* petitioners satisfied due process because it concluded that this issue was moot in light of the fact that they had been released from custody and were no longer within the jurisdiction of the state. *Hernandez-Lopez,* 639 N.W.2d at 235. The Iowa Supreme Court stated: "we decline to address their claims that

section 804.11, as applied to their specific factual situation, violated their rights to substantive and procedural due process." *Id.* The issue of whether the warrantless arrest of *these* petitioners was constitutional is not properly before this Court. *Robertson,* 520 U.S. at 86, 117 S.Ct. at 1029, 137 L.Ed.2d at 208.

The Iowa Supreme Court, however, did issue a careful and well-reasoned decision on the petitioners' facial due process challenge to the statute. In doing so, the Court addressed the claims the petitioners make in this petition for writ of certiorari. Petitioners argue that the *Hernandez-Lopez* decision is flawed because it stands in "stark contrast" to cases like *Cochran* and *Misik* and allows an officer to arrest a person "not even suspected of committing a crime but is only suspected of being a mere witness." Pet. Brief at 16. This claim is incorrect. The Iowa Supreme Court specifically found that in order to arrest a person as a material witness, the officer must have "probable cause to believe the individual is a necessary and material witness to a felony." *Hernandez-Lopez,* 639 N.W.2d at 239. The Court added the requirement that in order to comply with due process an officer also must have "probable cause to believe the individual will be unavailable for trial." *Id.* at 239-240.

The petitioners' claim that the statute allows an arrest without "so much as an ex parte warrant" was also addressed by the Iowa Supreme Court. Pet. Brief at 16. The *Hernandez-Lopez* Court specifically addressed the petitioners' contention that "the material witness statute violates the Due Process Clause by permitting law enforcement personnel to detain an individual without first obtaining an arrest warrant." *Id.* at 242. The Court stated that prior to arresting an individual as a material witness,

it is preferable that an officer "obtain an arrest warrant from a magistrate by demonstrating his reasons for believing an individual to be a material witness reasonably likely to be unavailable for trial." *Id.* The only constitutional challenges the petitioners have even arguably preserved were decided in their favor by the Iowa Supreme Court.

CONCLUSION

For the above reasons, the State respectfully asks this Court to deny Petitioners' Antonio Hernandez-Lopez, Joe Edward Ramirez, and Alberto Ruiz' Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 00-1855

Sioux County No. FECR008875
Sioux County No. FECR008876
Sioux County No. FECR008877

ORDER

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTONIO HERNANDEZ-LOPEZ,
JOE EDWARD RAMIREZ and
ALBERTO RUIZ,
Material Witnesses-Appellants.

(Filed Jan. 03, 2001)

This matter comes before the court upon the material witnesses' application for discretionary review. The State filed a resistance to the application.

After an independent review of the record, we grant the application for discretionary review. The appeal is order to proceed pursuant to Iowa Rule of Appellate Procedure 203. The witnesses shall be released upon posting $1,000.00 bail, cash or surety. The district court proceedings shall be stayed until further order of this court.

Dated this 3rd day of January, 2001.

/s/ Mark S. Cady
Justice, Supreme Court of Iowa

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IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

STATE OF IOWA Plaintiff vs. ANTONIO HERNANDEZ-LOPEZ, JOE E. RAMIREZ and ALBERTO RUIZ Material Witnesses.	CRIMINAL NOS. FECR8875, FECR8876. FECR8877 TRANSCRIPT OF BOND REVIEW HEARING

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BEFORE: JAMES D. SCOTT, District Judge
AT: Sioux County Courthouse
COMMENCING: October 30, 2000
ENDING: October 30, 2000

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Reported by Stephanie J. Early, CSR, RPR

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INTERPRETER: Karen Riano

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[7] witnesses, once I get into all of the discovery file, there may be further questions that I may have of these witnesses. And for that reason, I would resist their release at this time, although certainly I can understand their position and sympathize with them. But at the same time, I feel I have a person to represent and at this time I cannot tell the court for sure when we will be ready for trial. Thank you.

THE COURT: Has your client been arraigned?

MR. KANTER: No, Your Honor.

THE COURT: When do you think that will happen, Mr. Schouten?

MR. SCHOUTEN: The arraignment is set for today, Your Honor.

THE COURT: Mr. Jacobsma, I'll give you the last word if you want. Is there anything further you'd like to say?

MR. JACOBSMA: I would just like to tell the court, as has already been stated, these gentlemen's depositions have been taken, their testimony has been given. If they are unavailable for trial, I believe their testimony can be used for either party, and I believe that

to hold them further without a definite trial date is violating their constitutional and statutory rights. I have nothing further.

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